United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL 74-1218 B/P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1218, 1265, 1266, 1284, 1436

In the Matter of the Complaint

of

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS, for exoneration from or limitation of liability.

COMPANIA NAVIERA EPSILON, S.A., Plaintiff, as Owner of the M.S. NICOLAOS S. EMBIRICOS,

Appellant.

69 Civ. 5303

BINGHAM & COMPANY, et al.,

Plaintiffs-Appellants,

against

THOS. & JNO. BROCKLEBANK, LTD.,

Defendant-Appellee.

70 Civ. 290

KELLER INDUSTRIES INC.,

Plaintiff-Appellant,

against

THOS. & JNO. BROCKLEBANK, LTD., et al.,

Defendants-Appellees.

69 Civ. 4044

On Appeal from the United States District Court
For the Southern District of New York

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT KELLER INDUSTRIES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT KELLER INDUSTRIES, INC.

Statement

This brief will reply to the following arguments made in "POINT III" (pp. 11-21) of the brief of Defendant-Appellee Thos. & Jno. Brocklebank, Ltd. (hereafter "Brocklebank").

1. "A. Guaranteed Freight Clauses Have Uniformly Been Held Valid and Enforceable."
(Brocklebank's brief at pp. 11-15)

However, in each case cited in Brocklebank's brief in support of this argument the vessel's failure to deliver the cargo at the bill of lading destination was due to an excusable circumstance *other* than the fault or negligence of the carrier or the vessel. In no case was it due to the fault or negligence of the carrier or the vessel.

Thus in *Alcoa S.S. Co.* v. *U.S.*, 338 U.S. 42 (1949) (p. 11) the vessel was torpedoed. In the *Allanwilde Transport Corp.* v. *Vacuum Oil Co.* (The ALLANWILDE), 248 U.S. 377 (1919); *International Paper Co.* v. *The Gracie D. Chambers*, 248 U.S. 387 (1919); and in the *Standard Varnish Works* v. *The Bris*, 248 U.S. 392 (1919), cases (p. 12) the voyage was embargoed by the government. (See also Keller's main brief at pp. 6-7.)

In *Hirsch Lumber Co.* v. *Weyerhaeuser S.S. Co.*, 233 F.2d 791 (2d Cir. 1956) (p. 13) a shore strike prevented the vessel from unloading in Port Newark. In *New Orleans & South American Steamship Co.* v. *W.R. Grace & Co.*, 26 F.2d 967 (2d Cir. 1928) cert. den. 278 U.S. 636 (p. 13) the vessel was lost by fire. There is no mention or finding of any fault or negligence by the carrier or the vessel. In *National Steam Navigation Co. of Greece* v. *International Paper Co.*, 241 F.2d 861 (2d Cir. 1917) (p. 13) the vessel

was destroyed by fire. There is no mention or finding of any fault or negligence by the carrier or the vessel. In *Pope & Talbot* v. *Blanchard Lumber Co. of Seattle,* 159 F.2d 134 (9th Cir. 1947) (p. 13) the vessel was torpedoed and the Court held the carrier was justified in abandoning the voyage. In *Mitsubishi Shoji Kaisha Ltd.* v. *Society Purfina Maritime,* 133 F.2d 552 (9th Cir. 1942) cert. den. 318 U.S. 781 (p. 13) the voyage was frustrated because the vessel was requisitioned by the Belgian government. In *United States* v. *American Trading,* 132 F.Supp. 536 (N.D. Cal. 1956) (p. 13) the shipper insisted that the vessel discharge its cargo which had already been loaded.

In the *Malcolm Baxter,* 277 U.S. 323 (1928) (pp. 13-14), the Supreme Court held that the vessel's failure to complete the voyage was *not* due to its earlier unseaworthiness, but to a subsequent government embargo (after the vessel had been repaired). There was no finding in the *Malcolm Baxter* case (cited *supra*), that the fault or negligence of the carrier or the vessel prevented the delivery of the cargo at the bill of lading destination. (See also Keller's main brief at pp. 11-12.)

In *Globe & Rutgers Fire Insurance* v. *U.S.,* 105 F.2d 160 (2d Cir. 1939) (p. 14), the non-delivery of the cargo was due to a fire for which the carrier was held to be *not* liable. There was *no* finding in the *Globe & Rutgers* case (cited *supra*) that the fault or negligence of the carrier or the vessel had caused the fire or prevented the delivery of the cargo. (See also Keller's main brief at pp. 7-12).

Similarly the quotation from the book by H. Longley, entitled *Common Carriage of Cargo* is *not* supported by its footnotes. (*Common Carriage of Cargo* footnotes 18-21 on pp. 233-4). Thus Mr. Longley's footnotes cited the GRACIE D. CHAMBER, THE ALLANDWILDE, and *Standard Varnish Works* v. *the Bris,* the three government embargo cases,—*supra.* Mr. Longley's footnotes also cite the *National Steam Navigation Co.* case, already referred to at page 2 *supra* under

the name *New Orleans & South American Steamship Co.* Mr. Longley's footnotes also cite the *Steel Chemist,** 1964 A.M.C. 1284, 1291 (S.D.N.Y.) and *Mediterranean Agencies* v. *Rethymnis & Kulukindis,* 185 F.Supp. 34 (S.D.N.Y. 1960), which are cited at pages 4-5 of Keller's main brief, and hold that a carrier may recover on an "earned" freight clause *only* when the carrier's failure to deliver the goods was without the carrier's fault or negligence. The last case cited in Mr. Longley's footnotes, is *The Louise,* 58 F.Supp. 445, 1945 A.M.C. 363 (D.Md.). In that case the Court held that the "legally efficient cause of the breaking up of the voyage" was the vessel's unseaworthiness "and not the requisition of the ship", and that "the unseaworthiness was due to the gross negligence of the shipowner". Therefore the Court held that the shipowner could not retain prepaid freight, saying:

> "To permit the shipowner to receive and retain the prepaid freight under the circumstances here would be tantamount to a fraud on the cargo owners." (1945 A.M.C. 363 at p. 370)

See *Common Carriage of Cargo* by H. N. Longley, footnotes "18", "19", "20" and "21" on pp. 233-234.

"B. Cases Involving the Enforcement of the Guaranteed Freight Clause Where The Loss Resulted From a Fire Provides a Close Analogy to Cases Involving a Loss Resulting From Negligent Navigation."

(Brocklebank's brief at pp. 15-17)

In support of this contention Brocklebank's brief argues that:

> "Since the Guaranteed Freight Clause is enforceable in case of a loss by fire, even though fault of an em-

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* In Keller's main brief the "STEEL CHEMIST" is cited as *"Firestone International* v. *Isthmian Lines Inc."*

> ployee may exist, there is surely no basis for not enforcing such clause, in a negligent navigation situation. In both such cases, no liability to cargo is involved."
>
> (Brocklebank's brief p. 16)

Again, however, none of the cases cited in Brocklebank's brief supports its contention that a carrier may collect freight where fire caused by the fault or negligence of the ship or its employees has prevented the delivery of the cargo.

Thus in *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo,* 320 U.S. 249 (1943), the Court decided only that the protection of the fire statute extended to the vessel in an *in rem* action as well as to the shipowner. There is no reference to whether the owner may collect freight, on non-delivered cargo.

In *Albina Engine & Machine Works* v. *Hershey Chocolate Corp.,* 295 F.2d 619 (9th Cir. 1961) the Circuit Court held that the shipowner was not liable for cargo damage caused by a fire started by ship repairmen. There is no reference to whether the carrier may collect freight on non-delivered cargo.

In *National Steam Navigation Co. of Greece* v. *International Paper Co.,* 241 F.86 (2d Cir. 1917) the vessel and cargo were lost by fire and the Court held that the carrier could collect the freight, but there was no finding that the fire was caused by negligence—nor was that point mentioned.

Similarly, in *New Orleans & South American S.S. Co.* v. *W.R. Grace & Co.,* 26 F.2d 967 (2d Cir. 1928) cert. denied 278 U.S. 636, the vessel was lost by fire and the carrier was held to be entitled to recover its freight, but again there was no finding that the fire was caused by any negligence, nor was that point mentioned.

Thus in none of the above fire cases cited by Brocklebank as "analogous" was it held that a carrier could recover

freight on non-delivered cargo when the fire was caused by the negligence of the vessel or its crew.

In its footnote on p. 16 and again on p. 20 Brocklebank quotes p. 8 of Keller's main brief discussion of the *Globe & Rutgers* case that

> "the fire and its consequences was considered as having been caused by an accident, and not by negligence."

It is correct that in the *Globe & Rutgers* case the Court made no actual finding that the fire and consequent loss of the cargo was caused by an "accident". The point however is that the *Globe & Rutgers* Court made *no* finding that the fire and the consequent non-delivery of the cargo was caused by *negligence.* It found that the fire was not caused by the design or neglect of the owners. It did *not* find that it was caused by negligence. In our case, however, the District Court has found and Brocklebank admits that the Master's *negligence* was the cause of the loss of the cargo.

"C. The Guaranteed Freight Clause Has Been Held Enforceable in a Negligent Navigation Situation."

(Brocklebank's brief pp. 17-18)

The only case Brocklebank cites over "the past 56 years" to support its contention that the carrier may recover freight on cargo non-delivered due to the vessel's negligence is *In Re Pacific Far East Line Inc.,* 314 F.Supp. 1339 (N.D. Cal. 1970).

In that case the issue of whether a common carrier can collect freight on cargo non-delivered due to the negligence of the vessel, was not fully argued and the issue was *not* part of the case on appeal. This was because it was of no importance to the cargo interests on the GUAM BEAR, whether the GUAM BEAR kept its freight money or not, since all of the damages to the GUAM BEAR's cargo interests, including any freight it had to pay were recoverable and

recovered from the other negligently colliding vessel, the ESSO SEATTLE. For this reason the GUAM BEAR's cargo did not participate in the appeal, and the freight issue was not argued on appeal—or adequately argued below.

Thus the instant case remains the first case where this issue is now being squarely argued.

"D. Cases Where The Guaranteed Freight Clause Has Been Held Unenforceable and Comments of Brief of Counsel for Keller."
(Brocklebank's brief pp. 18-21)

Brocklebank argues that where freight has been held uncollectible, the basis for such denial has not been simple liability of the carrier, but deviation "in which case all bills of lading clauses are ousted". In support of this it cites *The Willdomino,* 272 U.S. 718 (1927).

However, the Supreme Court *Willdomino* decision only decided three certified questions, *none* on freight. It was the Circuit Court decision in the *Willdomino* case which held the carrier could not recover freight—and that was not because of deviation, but because the Circuit Court held freight is not collectible when cargo is so badly damaged by the carrier's "negligence"* (i.e., negligent navigation), that it is no longer in specie.

> "The clause in the bill of lading 'Freight on the goods and charges as per margin New York ship lost or not lost' does not, in our view, require the payment of freight for goods so damaged by the carrier's negligence that they cannot be delivered in specie."
>
> *The Willdomino,* 300 F.5 p. 31 (C.C.A. 3rd 1924).

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* The carrier's "negligence" in the *Willdomino* case, was the Master's failure to take soundings which resulted in the stranding.

> "We think that the stranding resulted from the failure to take soundings; that such failure was a fault or error in navigation or in management of the vessel." 300 F.5 at p. 16

The Circuit Court dealt with the deviation question only in connection with whether the carrier would retain the benefits of its $100.00 package limitation.

Brocklebank quotes *Iligan International Corp.* v. *SS John Weyerhaeuser,* 372 F.Supp. 859 at p. 869 (S.D.N.Y. 1974) that freight is to be returned

> "only if there has been a deviation from the voyage which goes to the essence of the contract."

This holding as to freight however, is in error. The cargo loss and damage in the *Iligan* case were caused—not just by negligence—but by the carrier's failure to exercise due diligence to make the vessel seaworthy, i.e.,

> "After a complete review of the evidence this Court finds that Weyerhaeuser failed to exercise due diligence to provide a seaworthy vessel. . . ." (p. 865)

When failure to exercise due diligence to make the vessel seaworthy causes the loss of the cargo, then freight is certainly not collectible.

> *Mediterranean Agencies Inc.* v. *Rethymnis & Kulukundis, Ltd.,* 185 F.Supp. 34 (S.D.N.Y. 1962).
>
> ". . . whether or not the charterer is entitled to a return of the prepaid freight depends upon proof of the foundation fact, that is, whether the loss of the ship and cargo was caused by unseaworthiness . . . or by a peril of the sea. . . ." (185 F.Supp. 34 at p. 36)
>
> See also *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp., The Esso Providence,* 112 F.Supp. 630 (S.D.N.Y. 1953).*

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* In the *Esso Providence* case (cited *supra,* p. 11) the suit for freight and the suit for general average were both dismissed because the shipowner had failed to prove due diligence with respect to the unseaworthy condition which caused the loss.

Brocklebank's Brief (p. 20) states that *Firestone International Co.* v. *Isthmian Lines, Inc.* (STEEL CHEMIST) (cited *supra*, p. 3) has no bearing on the present case since "the shipowner was held liable to cargo". However, the shipowner was held liable to cargo only up to the $500.00 package limit. The return of the ocean freight was *in addition* to the shipowner's liability to cargo under the package limit.

Brocklebank's last argument is that

> "where . . . public policy as set forth by statute itself expressly exonerates the party from such negligence, i.e., negligent navigation"

then its "freight earned" clause need not expressly stipulate for recovery even where cargo is lost by negligence.

The most recent rebuttal to this contention is in the Decision of this Court, In *J. Howard Smith, Inc., J. H. Baker & Bros., Inc., Wilbur Ellis Co., International Proteins Corp., Cargill, Inc. and Gloucester Byproducts, Inc.* v. *SS Maranon & Corporation Puruana de Vapores*, in Docket No. 73-1921 decided July 25, 1974 (not yet reported) where this Court said of the carrier's attempt to collect general average contributions from cargo:

> "The negligence of the master, as we have observed, does not give rise to liability of the carrier. Nor does it defeat the claim of the carrier for contribution in general average where the bills of lading include a 'Jason' clause, which invokes the right to general average for damage *caused by the negligence* of the crew or the master. The Jason, 225 U.S. 32 (1912). However, the bills of lading in this case did not contain a Jason clause, and the case is therefore controlled by the traditional rule that the ship at fault has no right to general average contribution. The *Irrawaddy*, 171 U.S. 187 (1898); G. Gilmore & C. Black, *The Law of Admiralty* § 5-13 (1957)" (emphasis added) (p. 4976)

Brocklebank's "earned freight" clause is defective, in that unlike its Jason clause (Keller's main brief at p. 16), it does *not* provide for the right to collect freight on cargo lost "whether due to *negligence* or not."

Thus even if freight, on cargo non-delivered due to negligence, could be made collectible by a properly worded "freight earned" clause, in the same way that general average contributions following a casualty resulting from negligence are collectible with a properly worded Jason clause, Brocklebank's freight is not collectible because its "freight earned" clause lacks a negligence provision.

Respectfully submitted,

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